

**IN THE UNITED STATES BANKRUPTCY COURT**  
**FOR THE EASTERN DISTRICT OF TENNESSEE**

In re

BRADFORD KYLE PARKINS,

Debtor.

No. 95-21647

Chapter 7

GLORIA PARKINS,

Plaintiff,

vs.

Adv. Pro. No. 96-2002

BRADFORD KYLE PARKINS,

Defendant.

**M E M O R A N D U M**

APPEARANCES :

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MARCIA PHILLIPS PARSONS  
UNITED STATES BANKRUPTCY JUDGE

In this adversary proceeding, plaintiff Gloria Parkins seeks a determination that a judgment she obtained against her former husband and debtor, Bradford Kyle Parkins, is nondischargeable pursuant to 11 U.S.C. § 523(a)(4) and (6). The parties have filed cross motions for summary judgment, each agreeing that the case presents no genuine issue of material fact but disagreeing as to whom is entitled to judgment as a matter of law. For the reasons set forth below, the motion for summary judgment filed by the plaintiff will be granted and the motion for summary judgment filed by the debtor will be denied. This is a core proceeding. See 28 U.S.C. § 157(b)(2)(I).

#### I.

On March 16, 1995, before the debtor's bankruptcy case was filed and while the parties were still married, the debtor and plaintiff were sued in the Chancery Court for Greene County, Tennessee by Cynthia Holcomb. Ms. Holcomb had previously advanced \$65,000.00 to the debtor, a building contractor, in connection with a contract between her and the debtor for the construction of a house. In the lawsuit, Ms. Holcomb sought the return of the \$65,000.00, rescission of the contract, and damages for fraud. Upon the failure to answer or otherwise respond to the complaint, Ms. Holcomb was granted a default judgment

against both the debtor and plaintiff on May 11, 1995. The specific allegations made by Ms. Holcomb in the state court complaint against the Parkins are recited in a memorandum opinion by this court filed on December 13, 1996, in the adversary proceeding entitled *Cynthia Holcomb vs. Bradford Kyle Parkins (In re Parkins)*, no. 95-2057. In that opinion, the court concluded that the default judgment obtained against the debtor by Ms. Holcomb established the elements of 11 U.S.C. § 523(a)(2)(A), the judgment was entitled to collateral estoppel effect, and the judgment debt owed to Ms. Holcomb by the debtor was nondischargeable.

Five months after Ms. Holcomb obtained her default judgment against the parties, the debtor filed for chapter 7 relief. On January 5, 1996, plaintiff initiated this adversary proceeding by filing a complaint to determine dischargeability of debt. This complaint alleges that during service of process of the state court lawsuit brought by Ms. Holcomb, the debtor intentionally and maliciously intercepted plaintiff's copies of the summons and complaint, forged the plaintiff's signature upon the summons to acknowledge receipt of service of process by the plaintiff in order to deny her the opportunity to defend against the lawsuit, and intercepted a copy of the default judgment when it was mailed to the parties in order to prevent the plaintiff

from having the judgment set aside. The plaintiff contends that because of the debtor's intentional and malicious conduct toward her, she did not learn of the complaint and the subsequent default judgment until more than 30 days after entry of the judgment. Plaintiff asserts that upon learning of the default judgment, she undertook efforts to have the judgment against her set aside and that while she was successful at the trial court level, the matter was presently on interlocutory appeal to the Tennessee Court of Appeals. It is the plaintiff's position that because of the debtor's conduct in allowing the default judgment to be entered against her, the debtor is liable to her for the amount of the default judgment and the legal fees and expenses she has incurred in her effort to have the default judgment set aside, which effort was ultimately unsuccessful as discussed below. Plaintiff requests that the court determine that this liability is nondischargeable under 11 U.S.C. § 523(a)(4) because it was the result of fraud and embezzlement by the defendant for funds entrusted to him while serving in a fiduciary capacity, *i.e.*, a building contractor, and that the debt be found nondischargeable under 11 U.S.C. § 523(a)(6) because it resulted from the intentional and malicious acts of the debtor which caused injury to the plaintiff.

In his answer to the complaint, the debtor admits signing

his wife's name to the summons and entry of the default judgment, but otherwise denies the plaintiff's allegations. At a scheduling conference in this adversary proceeding on March 26, 1996, the parties jointly requested that the proceeding be stayed until such time as the Tennessee Court of Appeals ruled on the appeal in the underlying *Holcomb* state court action. That request was granted.

On January 5, 1998, plaintiff filed her pending motion for summary judgment representing that the Tennessee Court of Appeals reversed on appeal the decision of the state trial court setting aside the default judgment rendered against her in favor of Ms. Holcomb and that she was forced to pay the unpaid balance of the default judgment in the amount of \$63,977.76. The motion further recites that since the initiation of this adversary proceeding, the divorce case between the plaintiff and the debtor was adjudicated by the Chancery Court for Greene County, Tennessee. On October 20, 1997, the state court chancellor entered a judgment against the debtor in favor of the plaintiff in the amount of \$115,700.00, "which [amount] constitutes the amount of the default judgment and interest paid by the plaintiff, as well as the fees and expenses she incurred." A certified copy of that judgment is attached to the motion. The Plaintiff seeks summary judgment in her favor, asserting that

there is no genuine issue as to any material fact and that the judgment which she holds against the debtor is nondischargeable under 11 U.S.C. § 523(a)(4) and (6) as a matter of law.

On January 22, 1998, the debtor filed a response to the plaintiff's motion for summary judgment and his own motion for summary judgment. He asserts that plaintiff is not entitled to summary judgment under § 523(a)(6) of the Bankruptcy Code because the acts of the debtor that were deliberate and intentional were toward a third party, Cynthia Holcomb, rather than the plaintiff, and that such acts did not necessarily or inevitably cause harm to the plaintiff. The debtor also asserts that summary judgment is not appropriate under § 523(a)(4) of the Code because the debtor was not acting in a fiduciary capacity and there was no legally recognized express or technical trust between the debtor and the plaintiff at the time of the alleged fraudulent acts. Finally, the debtor contends that there is no genuine issue as to any material fact and that he is entitled to summary judgment since "the allegation that the [debtor's] acts were intentional and malicious is not supported by the pleadings or by the evidence within the purview of Section 523(a)(6)" and because "[t]here was no fiduciary relationship between the [debtor] and his then wife, the Plaintiff, within the purview of Section 523(a)(4)."

On February 3, 1998, plaintiff filed a response to the debtor's summary judgment motion in which she replies to the debtor's allegations regarding the § 523(a)(6) cause of action. She contends that contrary to the debtor's assertions, the undisputed facts in the case establish that the debtor is guilty of willful and malicious acts which were directed at her, that these acts resulted in the default judgment being taken against her and, therefore, the injury to her is such that she is entitled to summary judgment under § 523(a)(6). Attached to the response is an unauthenticated "TRANSCRIPT OF PROCEEDINGS" from the Chancery Court of Greene County, Tennessee dated July 5, 1995, which includes the debtor's testimony in the *Holcomb* state court lawsuit during a hearing before the trial court to set aside the default judgment. The debtor has neither replied to the plaintiff's response of February 3, 1998, nor has he objected to the court's consideration of the unauthenticated transcript. Accordingly, the transcript will be considered by the court. See, e.g., 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2722 n.38 (2d ed. 1983) and cases cited therein (any inadequacy as to authenticity of evidence submitted in support of summary judgment motion waived by the lack of timely objection by opposing party).

## II.

Summary judgment under Fed. R. Civ. P. 56(c), made applicable to bankruptcy adversary proceedings by Fed. R. Bankr. P. 7056, is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See *Celotex Corporation v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2554 (1986). Any inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. See *McCafferty v. McCafferty (In re McCafferty)*, 96 F.3d 192, 195 (6th Cir. 1996)(citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)). By their cross motions for summary judgment, the parties agree that this dispute presents no contested factual issues and may be properly disposed of by summary judgment. Their disagreement, of course, is over who is entitled to that judgment.

Section 523(a)(6) of the Bankruptcy Code excepts from discharge "any debt ... for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). The Sixth Circuit Court of Appeals defined "willful" and "malicious" injury in *Perkins v. Scharffe*, 817 F.2d 392 (6th Cir. 1987), *cert. denied*, *Scharffe v. Perkins*, 484 U.S. 853, 108 S. Ct. 156 (1987), wherein the court stated:



An injury to an entity or property may be a malicious injury within this provision if it was wrongful and without just cause or excessive, even in the absence of personal hatred, spite or ill-will. The word 'willful' means 'deliberate or intentional' a deliberate and intentional act which necessarily leads to injury. Therefore, a wrongful act done intentionally, which necessarily produces harm and is without just cause or excuse, may constitute a willful and malicious injury.

*Id.* at 394 (quoting 3 COLLIER ON BANKRUPTCY 523-111 (15th ed. 1986)); see also *Vulcan Coals, Inc. v. Howard*, 946 F.2d 1226, 1229 (6th Cir. 1991). Recently, however, the *Perkins* definition was rejected by the United States Supreme Court to the extent that the definition could be read as encompassing recklessly or negligently inflicted injuries. In *Kawaauhau v. Geiger*, \_\_\_ U.S. \_\_\_, \_\_\_ S. Ct. \_\_\_, 1998 WL 85302 (March 3, 1998), the court held that "'willful' in (a)(6) modifies the word 'injury'" and, therefore, nondischargeability under § 523(a)(6) "takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." *Id.* at \*3. Using this standard, the court will examine the evidence presented and determine whether it establishes a wrongful and deliberate or intentional injury, without just cause or excuse.

### III.

The debtor admits in his answer filed in this adversary

proceeding that he signed the plaintiff's name on the summons in the *Holcomb* lawsuit. Furthermore, the transcript of the July 5, 1995 proceeding before the Chancery Court for Greene County, Tennessee, reveals that the debtor led the constable, who was serving him with process at the parties' marital home, to believe that he would have plaintiff acknowledge receipt of her copies of the summons and complaint when she returned home. The debtor offered the explanation that he did so in order to spare his wife the embarrassment of being served at her place of employment. The debtor also testified in the state court proceeding that he did not thereafter inform plaintiff that she was a party or otherwise involved in any manner with the *Holcomb* lawsuit. He testified that he retrieved the parties' copies of the default judgment from the mail at their home and never told plaintiff about the judgment. Finally, the debtor's testimony clearly establishes that plaintiff was not involved in any way with the debtor's construction business and she received "not one nickel" of the money which had been advanced to him by Ms. Holcomb.

The parties' final judgment of divorce dated October 30, 1997, recites in pertinent part the following:

That as a result of the fraudulent conduct of Bradford Kyle Parkins in reference to the Holcomb case that Gloria Susong Parkins was required to pay the sum

of \$63,977.76 to Mrs. Holcomb and this Court specifically finds that Gloria Susong Parkins' conduct in the Holcomb matter in no way justified her being assessed with the Judgment in that cause and that she would not have been assessed with any portion of the Judgment in that cause but for the fraudulent conduct of Bradford Kyle Parkins and, therefore, Gloria Susong Parkins shall have and recover a judgment against Bradford Kyle Parkins in the amount of \$63,977.76 plus attorneys' fees and costs totaling \$100,000.00 plus interest from the date of payment to Ms. Holcomb on January 14, 1997, at the interest rate provided by law and that Gloria Susong Parkins was also required to post a cash bond in this cause which funds she had to borrow and is obligated to pay interest upon and this Court finds that said expense would not have incurred but for the fraudulent conduct of Bradford Kyle Parkins and, therefore, Gloria Susong Parkins shall have and recover a Judgment against Bradford Kyle Parkins in the amount of \$6,000.00;

....

That in addition to the payment of the Holcomb Judgment in the amount of \$63,977.76, which would not have been required of the Plaintiff, Gloria Susong Parkins, but for, the fraudulent conduct of Bradford Kyle Parkins, this Court specifically finds that the Plaintiff, Gloria Susong Parkins, has been required to pay \$35,000.00 in legal fees and related expenses to the law firm of Rogers, Laughlin, Nunnally, Hood & Crum, P.C., as the result of the trial proceedings in the Holcomb case and the appeal related thereto and that said expenses and attorneys' fees would also never [have] been incurred but for the fraudulent conduct of Bradford Kyle Parkins, and accordingly, the Court awards a Judgment in favor of Gloria Susong Parkins against Bradford Kyle Parkins in the amount of \$35,000.00;

....

... Based on the foregoing findings of fact it is, accordingly, ....

....

... ORDERED, ADJUDGED and DECREED ... that Gloria Susong Parkins have and recover the sum of One Hundred Thousand and No/100 Dollars (\$100,000.00) from Bradford Kyle Parkins for expenses incurred as a result of his fraudulent conduct including the payment of the Holcomb Judgment and attorneys' fees and costs related to the Holcomb case that she would not have had to have incurred but for the misrepresentations, deceit and trickery of Bradford Kyle Parkins and the Court herein directs that the Plaintiff, Gloria Susong Parkins, have and recover of the original Defendant, Bradford Kyle Parkins, prejudgment interest from January 7, 1997 to the present date in the amount of Seven Thousand Five Hundred and No\100 Dollars (\$7,500.00) to reimburse her for the Holcomb Judgment and attorneys' fees and costs; ... and that Gloria Susong Parkins have and recover from Bradford Kyle Parkins the sum of Six Thousand and No/100 Dollars (\$6,000.00) as a result of the interest which She is required to pay for use of the Eighty Thousand and No/100 Dollars (\$80,000.00) bond which expense would not have been incurred, but for the fraudulent conduct of Bradford Kyle Parkins for a total Judgment in favor of Gloria Susong Parkins against Kyle [sic] Bradford Parkins in the amount of One Hundred and Fifteen Thousand Seven Hundred and No/100 dollars (\$115,700.00).

This court finds that all of the elements of § 523(a)(6) of the Bankruptcy Code are established by the sworn, undisputed testimony of the debtor in the state court proceeding and by the parties' judgment of divorce. Contrary to the debtor's assertion, the acts by the debtor of which the plaintiff complains and which are responsible for the damages sustained by the plaintiff are those which were directed toward her, not those which gave rise to the underlying lawsuit by Ms. Holcomb. These acts consist of forging the plaintiff's signature on the

summons to acknowledge receipt by the plaintiff of service of process, not informing plaintiff that she had been sued by Ms. Holcomb, and concealing the fact that Ms. Holcomb had obtained a default judgment against them both until it was too late for the plaintiff to have the default judgment set aside. From a review of the state court transcript, it is evident that these actions by the debtor were not the result of negligence, recklessness, oversight or mistake, but were instead a concerted and deliberate effort on the part of debtor to keep plaintiff from learning of the existence of the lawsuit against her. Because of the nature of debtor's actions, the court can only conclude that the debtor intended the injury sustained by the plaintiff.

Furthermore, it is clear that the plaintiff's judgment debt against the debtor directly resulted from the debtor's willful and malicious injury to the plaintiff. Because of the debtor's deception after the lawsuit was filed, plaintiff was unable to timely file an answer and Ms. Holcomb was able to obtain a default judgment against the plaintiff. The record plainly establishes that but for the default judgment, the plaintiff would have had no liability to Ms. Holcomb. The debtor testified that plaintiff was not involved in his construction business and that she had not received any of the funds advanced

to the debtor by Ms. Holcomb. The chancellor specifically found that it was "as a result of the fraudulent conduct of Bradford Kyle Parkins in reference to the Holcomb case that Gloria Susong Parkins was required to pay the sum of \$63,977.76 to Mrs. Holcomb ... and that Gloria Susong Parkins' conduct in the Holcomb matter in no way justified her being assessed with the Judgment in that cause and that she would not have been assessed with any portion of the Judgment in that cause but for the fraudulent conduct of Bradford Kyle Parkins ...." The chancellor further concluded that "but for the fraudulent conduct of Bradford Kyle Parkins," the plaintiff would not have incurred the obligation for attorney fees and costs arising out of her efforts to have the default judgment set aside.

Lastly, the record before the court establishes the "malicious" element of § 523(a)(6). As quoted above, maliciousness is not limited to personal hatred, spite, or ill-will, but encompasses any wrongful act without just cause or excuse. See *Perkins*, 817 F.2d at 394. While it may have been commendable that the debtor desired to save his wife from the embarrassment of being served with process at her place of employment, the fact remains that debtor did not thereafter inform his wife of the lawsuit being filed against her. Instead, he advised her of the lawsuit, but purposely omitted

the fact that she had been sued. He then failed to file an answer on her behalf, allowed the default judgment to be taken against her, and kept this information from her until it was too late for her to remedy her lack of defense. In light of these undisputed facts, the court has no hesitation in finding the debtor's actions were wrongful and without just cause. Compare *Fed. Deposit Ins. Corp. v. Cerar (In re Cerar)*, 97 B.R. 447 (C.D. Ill. 1989)(debt on note forged in cooperation with bank officials rendered nondischargeable pursuant to § 523(a)(6)); *Callahan v. Norton (Matter of Norton)*, 21 B.R. 725 (Bankr. W.D. Mo. 1982)(action of debtor in taking money from another's bank account by issuing forged checks and forging her signature on the signature card amounted to malicious injury of property rendering the debt created thereby nondischargeable).

#### IV.

This court having concluded that the judgment obtained by the plaintiff against the debtor is nondischargeable under 11 U.S.C. § 523(a)(6), it is not necessary for the court to consider whether the debt is also nondischargeable under § 523(a)(4). An order will be entered in accordance with this opinion denying the debtor's motion for summary judgment, granting the plaintiff's motion for summary judgment, and

excepting the judgment debt against the debtor from discharge.

FILED: March 5, 1998

BY THE COURT

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MARCIA PHILLIPS PARSONS  
UNITED STATES BANKRUPTCY JUDGE